STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

RAMA MADUGULA,

Plaintiff-Appellee,

v.

BENJAMIN A. TAUB,

Defendant-Appellant.

Supreme Court Case No. 146289

Court of Appeals Case No. 298425

Circuit Court Case No. 08-537-CK

CORRECTED BRIEF ON APPEAL – PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

Gerard V. Mantese (P34424)
Brian M. Saxe (P70046)
Mark C. Rossman (P63034)
MANTESE HONIGMAN ROSSMAN AND WILLIAMSON, P.C.
Attorneys for Plaintiff-Appellee
1361 E. Big Beaver Rd.
Troy, MI 48083
(248) 457-9200 phone
(248) 457-9201 fax

Peter S. Tangalos (P52969)
TANGALOS & ASSOCIATES, P.C.
Attorney for Plaintiff-Appellee
255 S. Old Woodward Ave., Ste. 330
Birmingham, MI 48009
(248) 641-5161 phone

Corene C. Ford (P66118)
BLUM & ASSOCIATES
Attorney for Plaintiff-Appellee
15815 W. 12 Mile Rd.
Southfield, MI 48076
(248) 552-8500 phone
(248) 552-1249 fax

Ian James Reach (P25316)
REACH LAW FIRM
Attorney for Defendant-Appellant
106 N. Fourth Ave., Ste. 100
Ann Arbor, MI 48104
(734) 994-1400 phone
(734) 994-6615 fax

John F. Ward, Jr.*
JENNER & BLOCK LLP
Attorney for Defendant-Appellant
353 North Clark St.
Chicago, IL 60654-3456
(312) 923-2650 phone
(312) 840-7650 fax

Jessica Ring Amunson*
JENNER & BLOCK LLP
Attorney for Defendant-Appellant
1099 New York Ave., N.W., Ste. 900
Washington, D.C. 20001-4412
(202) 639-6000 phone
(202) 639-6066 fax

**Pro hac vice.*

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APPELLEE'S COUNTER-STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On March 31, 2010, following a jury trial, the Washtenaw County Circuit Court entered an Order of Judgment, pursuant to MCL 450.1489, against Defendant-Appellant Benjamin Taub ("Taub") and in favor of Plaintiff-Appellee Rama Madugula ("Madugula") finding that Taub engaged in willfully unfair and oppressive conduct against Madugula under MCL 450.1489. (App. 16b-19b, 20b-21b). The Trial Court's order awarded a money judgment in favor of Madugula in the sum of $1,391,675, which consisted of $191,675 in "economic damages" and $1,200,000 for the "fair value" of Madugula's stock in Dataspace, Incorporated ("Dataspace").

On October 25, 2012, the Court of Appeals issued its Opinion affirming the Trial Court's order. (App. 168b-176b). All three judges on the Court of Appeals panel found "significant evidence" of willfully unfair and oppressive conduct by Taub against Madugula, and affirmed the award of $191,675 in economic damages. Judges Riordan and Borrello found that the Trial Court did not abuse its discretion when it denied Taub's motion for a new trial and remittitur based on Taub's claims that he was entitled to a bench trial under MCL 450.1489. Judge Krause issued an opinion concurring in part and dissenting in part.[1]

In its opinion, the Court of Appeals correctly held that (1) Madugula was entitled to a jury trial on his shareholder oppression claim; and (2) there was ample evidence of shareholder oppression to sustain the final order issued by the Trial Court. As discussed, Madugula was entitled to a jury trial; his interests under the Stockholders' Agreement are protected under section 1489; and the termination of his employment and employment benefits, and other restrictions on his meaningful participation in the company, disproportionately interfered with his interests as a shareholder. Therefore, the opinion of the Court of Appeals should be affirmed.

[1] Judge Krause concurred with the majority's analysis of oppression and affirmance of the award of damages, but she would have remanded for a bench trial with regard to the buy-out.

APPELLEE'S COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals correctly rule that the Trial Court did not abuse its discretion when it denied Taub's motion for a new trial and remittitur based on Taub's claim that he was entitled to a bench trial under MCL 450.1489, given that the Trial Court had authority to utilize a jury in deciding liability and awarding a buy-out and damages under section 1489, as the cause of action is "legal" in nature; the Legislature did not exclude the jury trial right; the Trial Court has broad discretion in awarding relief under section 1489; and a buy-out award under section 1489 is a form of damages?

The Trial Court answered: "Yes"

The Court of Appeals answered: "Yes"

Appellee answers: "Yes"

Appellant answers: "No"

II. Did the Court of Appeals correctly rule that Taub's repeated violations of the Stockholders' Agreement constituted further evidence of willfully unfair and oppressive conduct, in addition to the significant other evidence of willfully unfair and oppressive conduct, under MCL 450.1489?

The Trial Court answered: "Yes"

The Court of Appeals answered: "Yes"

Appellee answers: "Yes"

Appellant answers: "No"

III. Did the Court of Appeals correctly rule that Madugula's interests as a shareholder were interfered with disproportionately by Taub, and MCL 450.1489 was violated, where, while Madugula retained his corporate shares and directorship, there was ample evidence of a substantial and disproportionate interference with his shareholder interests?

The Trial Court answered: "Yes"

The Court of Appeals answered: "Yes"

Appellee answers: "Yes"

Appellant answers: "No"

COUNTER-STATEMENT OF FACTS

I. Background Of Dataspace And Madugula's Introduction To The Company

In 1994, Taub founded Dataspace, a close corporation specializing in "business intelligence and data warehousing." (App. 23b). Taub has always been the CEO and treasurer of the company in charge of the books, records, and accounting. (App. 69b-70b, 99b).[2]

In late 2002, Taub hired Madugula as an hourly contractor. (App. 24b). At that time, Dataspace was experiencing significant financial troubles, and, as Taub testified, it was "running out of cash" and losing "somewhere around 50 to 70,000 dollars a month." (App. 24b-25b). In the midst of this sharp financial plunge, Taub hired Madugula to fill the executive management position of Vice President of Sales and Business Development. (App. 25b, 67b-69b).

Immediately upon assuming this executive position with the company, Madugula "pushed forward in sales and marketing . . . and business development," and ultimately was "responsible for [Dataspace] winning a number of new clients[.]" (App. 25b-26b). Within six months of Madugula being hired, by the first half of 2003, revenues had grown and the company succeeded in reversing the trend of losing money. (App. 26b-27b). Dataspace went from losing approximately $100,000 a month to generating monthly profits. (App. 67b). Indeed, at trial, Taub testified that Madugula "did a great job." (App. 26b-27b).

II. Madugula's Status With The Company Changes; He Becomes A Shareholder

As a result of Madugula's phenomenal performance and turnaround of the company, Taub desired to make him a shareholder, and the parties commenced discussing the structure of such a deal. (App. 27b, 68b). Taub was having similar discussions with non-party Andy Flower,

[2] The evidence at trial showed that Taub refused Madugula access to the company books and records, and he withheld the passwords to the electronic company data from Madugula. (App. 70b-71b). Thus, Madugula was never allowed to review the books and records in the company computer system. (*Id*).

who also worked for Dataspace. (*Id*). Ultimately, Taub offered Madugula the opportunity to purchase a 29% stake in the company, and Flower 20%. (App. 28b).

However, at that time, the liquidation value of the company – upon which the buy-in was to be based – made it cost prohibitive for the prospective shareholders to purchase the shares. Therefore, in order to reduce the value and make the purchase price tenable, Taub caused the company to execute a promissory note in his favor for $321,000 plus interest. (App. 107b, 29b-30b, 68b-69b, 97b-98b). This promissory note had the effect of reducing the value of Dataspace by this amount – as Taub did not really lend any money to the company – rendering the price of the shares affordable for Madugula and Flower. (App. 30b).

On January 1, 2004, Taub and Madugula executed a Stock Purchase Agreement whereby Madugula received 17,400 (29%) of the 60,000 outstanding shares in the Company in exchange for his execution of a promissory note in the sum of $87,000. (App. 108b-113b, 89b). The purchase price was based on the "liquidation value of Dataspace," which had been reduced to $300,000 by virtue of the note to Taub.

Also, on January 1, 2004, Taub, Madugula, and Flower entered into a "Stockholders' Agreement" setting forth "the rules between shareholders" and a "Buy-Sell Agreement." (App. 114b-117b, 118b-120b, 36b-37b). Among other things, the Stockholders' Agreement sets forth a series of "Super Majority Provisions" enumerating certain protected actions which cannot be taken without the vote of 70% of the stock. (App. 116b). In pertinent part, section 5 provides:

> 5. Super Majority Provisions. The following enumerated super majority items shall require the affirmative approval of the holders of not less than seventy percent (70%) of the outstanding stock of Dataspace:
>
> * * *
>
> b. Material changes in the nature of the business conducted by Dataspace.
>
> * * *

d. Material changes in compensation, or methods of determining compensation, of Taub, Madugula and Flower, or other managers employed by Dataspace.

e. Establishment of annual capital expense budgets, or actual capital expenses, exceeding in the aggregate $100,000 per year.

* * *

f. Any other corporate action that would have a material adverse impact on Taub, Madugula or Flower, as opposed to the shareholders as a group in relation to their percentage ownership of the stock of Dataspace.

(*Id*). At trial, Taub conceded that the Stockholders' Agreement absolutely required him to obtain approval of at least 70% of the voting shares before he could modify compensation or significantly change the nature of the business. (App. 32b-33b). The purpose of this agreement was to prevent unilateral action on important issues that would affect the shareholders. (App. 82b-83b).

When the new shareholding arrangement was established, Taub, Madugula, and Flower also entered into an agreement among themselves concerning how they, as shareholders, would be compensated. Taub testified at trial as to this agreement:

> [Q.] Now, when . . . once you had taken in these new *shareholders*, was there any sort of discussion about how people were going to get paid? In other words, how much you were going to get compensated a year?
>
> * * *
>
> MR. TAUB: Yeah, we . . . uh, we eventually came to the decision that each of us *would have the same base salary*, um, and that the way that we would get, say bonuses, was by paying dividends. When the company did well, dividends would be distributed to the shareholders if the company had the cash to pay them.

(App. 59b-60b) (emphasis added). The "base salary" to be paid to each of the three shareholders was $150,000 per year. (App. 60b). Madugula's base salary was paid through a company called Midwest Business Associates, which was owned by his parents. (*Id*; App. 83b-84b). Madugula elected to have his share of the shareholder compensation paid through this other entity in order to obtain IRA options associated with Midwest, and also because it was a minority business

enterprise, which could have assisted in obtaining business for Dataspace. (App. 84b, 96b).

Under the Stockholders' Agreement, and the custom of the company, dividends were limited to what was necessary to cover the pass-through tax liabilities of the shareholders as a result of the S-corporation election, and so they were intended only to negate the tax burdens associated with the election. (App. 116b). Put another way, the dividends were intended only to negate the financial burden of owning the shares, not provide any sort of benefit. (*Id*). On only one occasion did Dataspace ever issue dividends in excess of what was necessary to cover the tax burden – this was in approximately 2003, and it was considered a bonus. (App. 27b, 34b). Thus, although Dataspace still dispenses dividends to the shareholders (Madugula and Taub) annually, it is only for purposes of covering the tax liability, and dividends never exceed that amount. (App. 61b). The principal benefit of becoming a shareholder was, thus, the $150,000 "base salary" and other related employment benefits.

In 2009 (after Flower left the company and Madugula was terminated), Dataspace purchased Flower's stock, and, at that point, Madugula's shareholding interest increased to 36.25% and Taub's to 63.75%. (App. 100b-102b).

III. Dataspace Grows Substantially; And Taub Becomes Enamored With The Prospect Of Selling The Business For More Than $10 Million

The company commenced to grow its revenues and profits quickly from the very first year that Madugula became a shareholder. From 2003 to 2004, the company grew from $3 million in revenues to $4.8 million. (App. 68b). In 2005, revenues increased to $5.5 million. (App. 71b). By 2005 and 2006, Dataspace had grown so substantially that Taub began pushing for a sale of the company, and Dataspace was actually approached and courted by at least four major investors. (App. 35b-38b, 41b-43b, 71b-73b). In connection with his push to sell the company for top dollar, Taub commissioned a valuation, as he explained at trial:

> At the time I believe we had been actually approached by a third company, a big publicly traded company, and we had high hopes for it, and we wanted someone to make sure that we were maximizing the value of what we could get out of that deal.

(App. 39b-40b). The valuation came in at $5.5 to $6.5 million. (App. 39b). Notwithstanding, 2006 ended up being the company's "best ever" year, and Taub was continuing to push the sale of the company for *double* the appraised value – $12 million. (App. 43b-44b, 51b, 72b-73b; see also App. 219b – "Ben would ask for some number of $10 million or higher"). Taub could not deny at trial that Madugula had done "a great job" and was a "good part" of the results the company (which was on the brink of demise 3 years earlier) was enjoying, and, thus, which gave rise to these big money prospects. (App. 43b).

In fact, 2006 was such a successful year that Taub caused the company's Board of Directors to pay Taub the full amount of Taub's promissory note, and it was thus entirely paid back plus interest by the close of 2006, in the total amount of $367,000. (App. 53b-56b). After Taub paid this note to himself and had been tabling these $10-$12 million offers, he set his sights on pushing Flower and Madugula out of the company – so that, now that the company had been salvaged, he could keep the benefits for himself.

IV. With The Company Having Had Its "Best Ever" Year, Taub Commences To Freeze Out His Fellow Shareholders, And, After Ousting Flower, Terminates Madugula On The Pretext Of False And Misleading Financial Projections

During 2006 and early 2007, when the company was coming off of its best year ever, Taub was "starting a set of conversations with Mr. Flower to kind of drive him out of the business." (App. 87b). Ultimately, Taub's scheme worked, and, in March 2007, Flower quit. Thereafter, Flower and Taub began discussing the sale of Flower's shares, and Taub started considering ways in which he could obtain a supermajority of shares, which he knew he would need in order push Madugula out of the business. Taub's intent to squeeze Madugula out of Dataspace is evidenced by, among other things, the fact that, on July 27, 2007, Taub sent an e-

mail to Dataspace's corporate counsel discussing the purchase of Flower's shares as one mechanism by which he could take control and dispose of Madugula:

> It's important to note that we have not yet set a sale date for Andy's shares. So, that begs the question, suppose Andy were not to sell his shares until after Rama sells his or suppose I were to purchase Andy's shares personally, rather than having Dataspace buy those shares. That would give me a 71% interest in the company and overcome the 70% limitations in the agreements. *As we discussed, I don't want to screw Rama but, if it would help out, we might want to consider this.*

(App. 121b) (emphasis added). This e-mail unequivocally shows Taub plotting, in writing, before terminating Madugula, of ways to take total control of the corporation, "sc**w Rama," and get Rama to sell his shares. Further, at trial, Taub conceded that he absolutely did need (and desired) the 70% supermajority in order to terminate Rama under the Stockholders' Agreement, and that is why he was considering this option. (App. 45b-46b, 48b).

Yet, on August 10, 2007, without having obtained a 70% supermajority; without having even held a shareholder meeting or a vote on the subject; and without providing any advance warning, Taub unilaterally served a "Notice of Termination" on Madugula, purporting to cut off all of Madugula's benefits, including his agreed upon shareholder "base salary," health benefits, car payment, and expense account.[3] (App. 122b, App. 46b, 58b, 82b-85b).

At trial, Taub claimed he unilaterally and suddenly fired Madugula principally because of his performance and Taub's own (unverified and admittedly unreliable) projections that the company was on a downward trend.[4] (App. 49b, 52b-53b, 62b). Contrary to these professed reasons, shortly after he terminated Madugula, Taub issued a glowing statement:

> Rama joined us in 2002 and provided us with a level of sales talent that we never had before. Rama's efforts were largely responsible for our growth from a $3 million company to a $7 million one. He is an extremely talented guy who has

[3] Madugula was removed from the health coverage because Dataspace's "policy won't allow us to keep people who aren't employees." (App. 47b).

[4] Although Taub referenced Madugula's "divisive" nature, Taub was unable to point to anything notable in this regard.

taught me a ton about sales and doing business with large organizations.

(App. 123b, 75b-76b). In addition, shortly before Madugula's firing, Taub was making very positive pronouncements about "a really significant deal" with Ford, which "puts our training on the fast track." (App. 126b, 127b, 103b-105b).

Moreover, the forecasts upon which Taub claimed to have based Madugula's firing were entirely unreliable and erroneous. (App. 52b-53b). In fact, the downward 2007 "projections" created by Taub were consistent with his practice of *always* presenting gloomy projections about the company – even when prospects were high in previous years. (App. 74b-76b). There was "always a downward slant" to the projections published by Taub, who, as a result of this pessimistic viewpoint, even nicknamed himself "the chief worry officer." (*Id*). In reality, Taub, motivated by the prospect of a sale of Dataspace, cut off all of Madugula's benefits and pushed him out of the company in order to "starve" him into selling his shares to Taub. (App. 86b).

Taub continues to receive the $150,000 salary which was to be paid equally to all shareholders, before their ouster. (App. 129b). Madugula, meanwhile, receives nothing more than the dividend necessary to cover the tax burden imposed by his ownership in Dataspace, which was only one of the agreed upon shareholder interests. (App. 61b).

V. Taub's Failed JPAS Initiative Was A Material Departure From Dataspace Business, Unilaterally Implemented By Taub, And Not Approved By The Shareholders

After Taub forced Madugula out of the company and eliminated all of his benefits, Taub felt free to do as he wished, and he drastically changed the direction of the company from consulting to the pursuit of a failed software product called JPAS. (App. 64b, 77b-78b). The attempted development of the JPAS software was a major departure and material change from the line of business in which Dataspace was previously involved. (App. 63b, 77b-79b, 92b-93b). However, this new endeavor was a complete failure, as not a single software package was ever

sold.[5] (*Id*). In fact, a working product was never developed; it was never implemented for any customers; and a working prototype was never developed. (App. 65b-66b, 78b-79b). Despite a substantial investment of several hundreds of thousands of dollars, "nothing came out of it." (App.79b, 106b). There was never a shareholder meeting to obtain a supermajority approval of this new direction or these expenditures, and the foray was never approved by, nor the extent of it ever known to, Madugula. (App. 79b-80b, 94b-95b, 106b).

ARGUMENT

In MCL 450.1489, the Legislature provided a special statutory cause of action in favor of minority or non-controlling shareholders who have been subjected to illegal, fraudulent, or willfully unfair and oppressive conduct. Section 1489 is designed to provide "unique" relief for shareholders of closely held companies, like Madugula, who are owed the strictest of fiduciary duties by those in control of the corporation, akin to those owed in a partnership. *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 280-281 (2002). According to the Legislature, section 1489 "shall be liberally construed . . . to give special recognition to the legitimate needs of close corporations." MCL 450.1103(c).

I. CLAIMS BROUGHT UNDER MCL 450.1489 REQUESTING A BUY-OUT AWARD OR DAMAGES ARE NOT EQUITABLE CLAIMS TO BE DECIDED BY A COURT OF EQUITY, AND THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED TAUB'S MOTION FOR A NEW TRIAL AND REMITTITUR

The most fundamental guarantee of fairness in the American judicial system is the right to a trial by jury of one's peers.[6] "Maintenance of the jury as fact-finding body is of such

[5] Taub aptly analogized his JPAS endeavor to "New Coke." (App. 63b).

[6] "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." 3 The Writings of Thomas Jefferson: Being His Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private 71 (HA Washington ed, 1859). See also *Anzaldua v Band*, 216 Mich App 561, 583 (1996), *aff'd on other grounds*, 457 Mich 530 (1998) ("In The Federalist No.

importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc v Westover*, 359 US 500, 501 (1959). See also *Jacob v City of New York*, 315 US 752, 752-753 (1942) (The jury trial right in civil cases is "a basic and fundamental feature of our system of federal jurisprudence," which "should be jealously guarded by the courts.").[7]

A. A Trial Court May Utilize A Jury In Deciding Liability And Awarding A Buy-Out Or Damages Under Section 1489, As The Cause Of Action Is "Legal" In Nature, The Legislature Did Not Exclude The Jury Trial Right, A Trial Court Has Broad Discretion In Awarding Relief Under Section 1489, And A Buy-Out Award Under Section 1489 Is A Form Of Damages

1. A Section 1489 "Claim" Has Two Components – The Shareholder Establishes Liability And The Court Provides A Remedy – Which Is Exactly What Happened In This Case

To obtain relief, the shareholder must bring a singular statutory *cause of action*. The statute "is quite clear in its mandate: § 489 creates a statutory cause of action along with flexible discretionary remedies to shareholders of closely held corporations." *Estes*, 250 Mich App at 278. Under the plain language of the statute, the shareholder must "establish . . . grounds for relief" by demonstrating that the acts of those in control were (1) illegal, (2) fraudulent, or (3) willfully unfair and oppressive. *Id* at 279. If the shareholder establishes this liability, the "court may make an order or grant relief as it considers appropriate," including providing any of a panoply of remedies, a non-exhaustive list of which is in the statute. See MCL 450.1489.

The jury verdict form in this case properly reflected the section 1489 framework. (App. 20b). The form, first, asked whether the jury found evidence of a violation of the statute:

83, Alexander Hamilton considered the 'essentiality' to liberty of trial by jury in civil cases.").

[7] Taub concedes that a request for damages under subsection 1489(1)(f) is not equitable and is properly submitted to a jury. Therefore, there is no dispute in this appeal that the trial judge properly utilized a jury in awarding pure money damages to Madugula under subsection 1489(1)(f). See, e.g, *Anzaldua v Band*, 457 Mich 530, 540-541, 554 (1998) ("[W]e conclude that the Legislature's use of the term 'actual damages' is significant. It indicates the Legislature's intent to provide for a jury right in suits brought under the act.").

1) Did Defendant engage in willfully unfair and oppressive conduct with regard to Plaintiff Rama Madugula?

2) Did the above-described conduct substantially interfere with the interests [of] Rama Madugula as a shareholder?

(*Id*). If the jury's answer to question 1 or 2 was "no," the jury was instructed to not proceed further because this "results in no cause of action for Plaintiff." (*Id*). Only if the jury's answer was "yes" to both questions 1 and 2, was the jury instructed to consider whether Madugula was entitled to monetary amounts for damages and a buy-out of his stock. (*Id*). The fundamental question that the jury answered was whether the facts established a section 1489 cause of action. This was perfectly appropriate.

2. The Jury Trial Right Is Retained For A Section 1489 Cause Of Action, Because It Would Have Been Denominated As Legal In 1963

The Michigan Constitution 1963, article 1, section 14, provides: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Michigan courts have interpreted the "shall remain" language to mean that the constitution "retains the right to a jury trial as it existed at the time the constitution was adopted and neither restricts nor enlarges it." *Anzaldua v Band*, 216 Mich App 561, 564 (1996) *aff'd on other grounds*, 457 Mich 530 (1998) ("*Anzaldua I*") (holding constitutional right to a jury trial "remains" in statutory cause of action under Whistleblowers' Protection Act).[8]

"[W]hen the Legislature creates a new cause of action without indicating whether the action is to be tried by a jury or the bench," the accepted test for determining if "the constitutional right to a jury trial is retained" is "whether the cause of action would have been denominated as legal at the time when the 1963 constitution was adopted and, therefore, whether

[8] See *Smith v Univ of Detroit*, 145 Mich App 468, 475 (1985), citing *Guardian Depositors Corp v Darmstaetter*, 290 Mich 445 (1939) (The jury trial "guaranty applies to cases arising under statutes enacted subsequent to adoption of the Constitution, which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted.").

a party bringing the action would have been accorded a right to a jury trial." *Anzaldua I*, 216 Mich App at 565, 575-576 (right to jury trial preserved for new statutory cause of action).[9]

a. The Nature Of A Section 1489 Action

Section 1489 was created by the Legislature in 1989, more than 25 years after Michigan's constitution was adopted, and it "provides a separate, independent, and statutory basis for a cause of action . . . in favor of minority shareholders who are abused by 'controlling' persons[.]" *Estes*, 250 Mich App at 278. The section 1489 cause of action did not exist in 1963 or at common law, but it is based on several well-known causes of action that existed in 1963 and which were and are legal in nature. A section 1489 cause of action has three fundamental bases of liability: (1) illegality, (2) fraud, and (3) willfully unfair and oppressive conduct. Each of these essentially reflects a legal cause of action that existed at the common law in 1963.

b. Actions Based On "Illegal" Conduct

With regard to "illegality," causes of action challenging conduct that is not according to or authorized by law existed in 1963, and was legal in nature. Conversion, for example, is an action at law, not a suit in equity.[10] Various other causes of action challenging illegality that may occur in the business context – such as extortion, embezzlement, and conspiracy to commit

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[9] See *Smith*, 145 Mich App at 476 ("[T]he question we must ask in this case . . . under the Elliott-Larsen Civil Rights Act, is whether the cause of action asserted is similar in character to a cause of action for which the right to a jury trial existed before the 1963 Constitution was adopted. We hold . . . that a jury trial on any legal claim is a litigant's right under the act."); *Hackett v Connor*, 58 Mich App 202, 207 (1975) ("[W]e must ascertain whether the issues raised by plaintiffs' complaint were 'historically . . . tried by the law courts or by the chancellor as of the time when the constitutional guarantee to the right of trial by jury was adopted.").

[10] *Piester v Ideal Creamery Co*, 289 Mich 489, 493 (1939). See also, e.g., *Bush v Hayes*, 286 Mich 546, 551-552 (1938) ("Evidence whether person in charge of corporation's elevator was liable for conversion of beans delivered to corporation by plaintiff . . . was for jury."); *Daggett v Davis*, 53 Mich 35, 38 (1884) ("Demand for the certificate, and refusal to deliver it . . . were evidence of a conversion to go to the jury."); *Barnard v German Am Seminary*, 49 Mich 444, 445 (1882) (referencing "actions at law . . . in trover for the conversion of logs"); *Ross v Bernhard*, 396 US 531, 533 (1970) (The federal Constitution, for example, has always "entitled the parties to a jury trial in actions . . . for conversion of personal property.").

illegality – are historically legal in nature and properly tried by jury.[11]

c. Actions Based On "Fraudulent" Conduct

With regard to "fraudulent" conduct, a cause of action for fraud or misrepresentation existed at common law in 1963 and was a legal claim carrying the right to a jury trial.[12]

d. Actions Based On "Willfully Unfair and Oppressive" Conduct

With regard to "willfully unfair and oppressive" conduct, an action challenging such conduct is not only akin to actions challenging fraud, illegality, and even breach of contract, but is also akin to an action for breach of fiduciary duty, which existed at common law in 1963 and was legal in nature in situations such as these.[13] A breach of fiduciary action historically lies in

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[11] See, e.g., *Swart v Kimball*, 43 Mich 443, 452 (1880) ("[W]hether there was an attempt at extortion would necessarily be judged by the jury, upon the evidence given[.]"); *Popielarski v Jacobson*, 336 Mich 672, 684 (1953) ("It became a jury question whether defendants or some of them conspired by false representations to defraud plaintiffs and whether plaintiffs relied on such representations."); *Turner v Konwenhoven*, 100 NY 115, 118, 121 (1885) (affirming jury trial verdict regarding whether "the plaintiff had appropriated and embezzled some of the moneys received by him, belonging to his master, to his own use").

[12] See, e.g., *Hughes v John Hancock Mut Life Ins Co*, 351 Mich 302, 312 (1958) ("[T]he question of fraud was for the jury and not for the court[.]"); *Otto Baedeker & Associates v Hamtramck State Bank*, 257 Mich 435, 441 (1932) ("The testimony would also justify the jury in finding that, although careless, defendant was deceived by plaintiff's trick into executing the instrument without reading it . . . . We think the testimony properly presented a question for the jury[.]"); *French v Mulholland*, 240 Mich 156, 158 (1927) (affirming verdict in fraud "action by law brought on for trial by jury, resulting in a verdict and judgment in plaintiff's favor," after case was transferred from equity to law side of the court); *Davidson v Bennett*, 84 Mich 614, 616 (1891) (The testimony was not without conflict as to what representations were made, nor of the failure to represent to the plaintiff facts which ought to have been represented, and the court erred in taking the question of fraud from the jury, and deciding that the plaintiff had been defrauded himself."). See also, e.g., *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 735 (2013) ("A claim alleging fraud is a tort claim.").

[13] See, e.g., *Depinto v Provident Sec Life Ins Co*, 323 F2d 826, 837(9th Cir, 1963) ("[W]e hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is, subject to appropriate instructions, a jury question."); *Ross v Bernhard*, 396 US 531, 542 (1970) (In shareholder derivative action against corporation's directors, alleging "gross abuse of trust, gross misconduct, willful misfeasance, bad faith, (and) gross negligence," Court held, "[t]he corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of . . . its rights against its own directors

tort.[14] Further, case law since 1963 reflects that breach of fiduciary duty[15] in the close corporation context is a legal cause of action to be tried by jury.[16]

e. A Section 1489 Action Is Historically "Legal" In Nature

Because the essence of a section 1489 claim is historically legal in nature, a shareholder has a right to a jury trial. See *Anzaldua I*, 216 Mich App at 584 ("[W]e hold that if the WPA had been in existence at the time of the adoption of the 1963 constitution, plaintiffs' actions here would properly have been denominated as legal actions, which retain the right to a jury trial."). Like the WPA action at issue in *Anzaldua I*, a section 1489 action "raise[s] the type of issues ordinarily raised in legal actions and addressed by juries," *id* at 581, namely deciding whether the facts presented amount to fraud, illegality, and fiduciary breaches. In *Anzaldua I*, the court

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because of their negligence."). Further, "[w]hether the corporation was viewed as an entity separate from its stockholders or as a device permitting its stockholders to carry on their business and to sue and be sued, a corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted." *Id* at 533-534.

[14] See, e.g., *Miller v Magline, Inc*, 76 Mich App 284, 312-313 (1977) ("Plaintiffs claim only that defendants have breached their fiduciary duty to the stockholders by refusing to declare a dividend out of the surplus being retained by the corporation. . . . Plaintiffs' action is premised upon a breach of fiduciary duty, which sounds in tort."); Restatement (Second) of Torts § 874 cmt b ("A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act."); *Estes v Anderson*, 2012 WL 5857283, at *6 (Mich App, Nov 15, 2012) ("[T]his state treats a breach of fiduciary duty claim as a common-law tort.").

[15] A fiduciary duty requires an officer or director, for example, to act "with good faith" and to "manage the affairs of the corporation solely in the interests of the corporation." *Dargis v Boss*, No. 273473; 2008 WL 4228350, at *3 (Mich App, Sept 16, 2008), citing *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 101 (1943); see also *Salvador v Connor*, 87 Mich App 664, 675 (1978). The fiduciary duty is analogous to the duty inherent in MCL 450.1489, which requires that the controlling party refrain from taking actions that are "willfully unfair and oppressive" to the minority shareholder or the corporation.

[16] See, e.g., *Kouza v Namou*, 2003 WL 1919531 (Mich App, Apr 22, 2003) ("The instructions did not preclude a finding of liability for breach of fiduciary duty had the jury accepted plaintiffs' theory."); *Brown v United Missouri Bank, NA*, 78 F3d 382, 388 (8th Cir, 1996) ("[B]reach of fiduciary duty is also a legal claim triable to a jury."); *Northeast Savings, FA v Plymouth Commons Realty*, 229 Conn 634, 642 (1994) (A claim alleging a "breach of fiduciary duty . . . is indisputably legal in nature."); *Mid Kansas Fed Sav & Loan Ass'n of Wichita v Orpheum Theater Co, Ltd*, 810 F Supp 1184, 1190 (D Kan, 1992) ("[C]laims . . . including fraud and breach of fiduciary duty . . . are legal in nature and are therefore triable to a jury.").

explained that "[a]ctions under the WPA primarily focus on factual issues such as whether the plaintiff 'blew the whistle,' whether the defendant was aware that plaintiff did so, and whether the decision to discharge the plaintiff resulted from the plaintiff's 'whistle-blowing' or from some other cause." *Id.* Likewise, establishing liability in a section 1489 action focuses on factual issues such as whether the defendant knowingly misrepresented or withheld information, whether the defendant siphoned money from the company for his personal benefit and to the detriment of the plaintiff, whether the defendant treated the plaintiff unfairly and acted contrary to the defendant's duties, or whether the defendant wrongfully terminated the plaintiff's employment and employment benefits. "These are the types of ordinary factual questions that typify legal actions tried to juries as opposed to the extraordinary issues that typify equitable actions in which judges act as fact finders[.]" *Id.*

As in *Anzaldua I*, "[t]hese aspects" of establishing liability under section 1489 "indicate that the drafters of the [statute] would have reasonably expected that the right to a jury trial would be retained in actions under the [statute]." *Id* at 584. See also *Forsberg v Forsberg Flowers, Inc*, No. 263762; 2006 WL 3500897 (Mich App, Dec 5, 2006) (The court, though reaching an erroneous conclusion, correctly recognized that, "to the extent MCL 450.1489 embodies a legal cause of action cognizable at common law, the right of a jury trial is preserved for an action under its terms. And this remains despite the absence of an express grant of a jury trial right under its provisions."). The jury trial right "remains" under the Michigan Constitution for purposes of establishing liability in a section 1489 action. Const 1963, art 1, § 14.

3. The Legislature Did Not Exclude The Jury Right In Section 1489

The Legislature could have, but chose not to, exclude the jury trial, despite the fact "that the Legislature knows how to provide that an action is to be tried to a judge." *Anzaldua v Band*, 457 Mich 530, 535 (1998) ("*Anzaldua II*"). Meanwhile, the law does not require that a statute

expressly provide for a jury trial to vest the plaintiff with jury trial rights. See *id* at 541 ("[T]he notion that the Legislature might intend a jury trial without explicitly so stating is not new."); *id* at 549 ("The jury right defined is in the nature of a floor, not a ceiling."). Here, (1) the Legislature intended that a jury trial be allowed in a section 1489 action (given, *inter alia*, the nature of the action, as discussed above, and the extremely wide latitude afforded to the trial judge, as discussed below); (2) the Legislature did not include any language precluding a jury trial; and (3) the Legislature did not include any language limiting the liability or remedy determination in a section 1489 action to a bench trial.

The Court should not infer, in these circumstances, that the Legislature intended to abrogate the plaintiff's fundamental right to a jury trial, where the Legislature has not clearly so stated. See, e.g., *Smith*, 145 Mich App at 475-476, citing *Risser v Hoyt*, 53 Mich 185 (1884) ("Where there are questions of fact to be determined and the issues are such that at common law a right to jury trial existed, that right cannot be destroyed by statutory change of the former action or creation of summary proceedings to dispose of such issues without jury, in the absence of conduct amounting to waiver."). The Court should not read such an invasive exception into section 1489 in the absence of any statutory language expressly waiving this fundamental right.[17]

4. Alternatively, A Trial Court's Broad Discretion Under Section 1489 Includes The Authority To Utilize A Jury In Awarding A Buy-Out Or Damages

For remedying a violation of MCL 450.1489, once the shareholder has established grounds for relief, the statute provides that "the circuit court *may* make an order *or* grant relief *as it considers appropriate*, including, *without limitation*, an order providing for any of" a *non-exhaustive* list of potential remedies, which includes "[t]he purchase at fair value of the shares of

[17] See, e.g., *Putney v Haskins*, 414 Mich 181, 187 (1982) ("[T]he Legislature chose not to write such an exception into the statute. We similarly decline to create such an exception by judicially amending the statute.").

a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts" and "[a]n award of damages to the corporation or a shareholder." MCL 450.1489(1) (emphasis added).

a. Section 1489 Vests Trial Courts With Virtually Unlimited Discretion In Awarding Relief

"Because this is a case of statutory interpretation, we necessarily examine the words that the Legislature chose in crafting § 489 of the MBCA[.]" *Estes*, 250 Mich App at 277. See also *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999) ("The words of a statute provide 'the most reliable evidence of [the Legislature's] intent[.]"). Here, the Legislature chose the broadest possible remedial language in vesting trial courts with complete discretion in awarding a remedy. See MCL 450.1489(1). See also, e.g., *Estes*, 250 Mich App at 278, 285 (Section 1489 provides for extremely "flexible discretionary remedies to shareholders of closely held corporations.").[18] This broad remedial language reflects the predominating view throughout the country.[19]

"This Court is required to look at the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute." *Estes*, 250 Mich App at 280. Here, the broad discretion afforded to trial courts in awarding relief

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[18] See also, e.g., *Schimke v Liquid Dustlayer, Inc*, No. 282421; 2009 WL 3049723 (Mich App, Sept 24, 2009) ("Thus, § 489 grants a court broad discretion to fashion a remedy it 'considers appropriate.'"); *Berger v Katz*, Nos. 291663, 293880; 2011 WL 3209217, at *16-19 (Mich App, July 28, 2011) ("[T]he statute gives a trial court broad discretion in deciding an appropriate remedy, and those remedies are not limited to those listed in MCL 450.1489(1)(a)-(f).") (The trial court's broad discretion under the statute includes ordering defendants to value plaintiff's shares, giving plaintiff option to sell his own shares or buy-out defendants' shares).

[19] "Most modern courts . . . see the oppression statutes as intended to expand shareholder remedies." O'Neal & Thompson, 2 Close Corp and LLCs: Law and Practice § 9:32 (Rev 3d ed). See also Thompson, *The Shareholder's Cause of Action for Oppression*, 48 Bus L 699, 722 (1993) (observing that "most courts and legislatures have given an expansive interpretation to remedies"); Moll, *Reasonable Expectations v Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 BC L Rev 989, 1018 (2001) ("The breadth of remedies for shareholder oppression provides the courts with great flexibility to choose a remedial scheme that most appropriately responds to the aggrieved shareholder's harm.").

in section 1489 actions is consistent with the fact that, with the passage of section 1489, the Legislature implemented a bold and aggressive statutory scheme, imbued with specific policies and principles, whereby "the Legislature intended to provide shareholders of closely held corporations special relief from ongoing oppression[.]" *Estes*, 250 Mich App at 281, *passim* (finding that, *inter alia*, section 1489 provides for a direct cause of action, abrogating the need for a derivative claim and abrogating the defenses attendant to a claim under MCL 450.1541a).

Consistent with the plain language and purpose of section 1489, a trial court's discretion includes the authority to utilize a jury in awarding the remedies of (1) a buy-out of stock (which is a form of "damages," as explained below) under subsection 1489(1)(e), or (2) *pure* money damages under subsection 1489(1)(f). On the other hand, a trial court's discretion to use a jury in awarding a remedy would not extend to circumstances where the remedy is, for example, any of those listed in subsections 1489(1)(a)-(d), which do not include any form of monetary relief.

In the present case, the Trial Court had discretion to utilize a jury in awarding Madugula monetary relief, and, ultimately a money judgment incorporating a buy-out of stock and pure money damages under MCL 450.1489(1)(e)-(f).

b. The Trial Court Strictly Complied With The Language Of Section 1489 In Awarding A Remedy – It "Made An Order"

In its grant of complete discretion to trial courts, the statute provides that a trial court "may make an order or grant relief as it considers appropriate." MCL 450.1489(1). In the instant case, the Trial Court strictly complied procedurally with the letter of the statute, "making an order" that awarded relief to Madugula, and doing so as it "considered appropriate."

A trial court's authority to "make an order" awarding relief under section 1489 exists whether or not the "order" follows a jury or bench trial, and the "make an order" language equally assumes both. The fact that the Legislature "used the word 'court' instead of 'jury'" is

not important in "understanding the Legislature's intent." *Anzaldua II*, 457 Mich at 536. What is important is what the Legislature "provided that the 'court' should do." *Id.*

In *Anzaldua II*, where "[t]he Legislature described the court's role in WPA actions in terms of 'rendering a judgment,'" this Court held that, "[w]hen a court renders a judgment, it is entering an order based on previously decided issues of fact. . . . [I]t is the procedural step the judge takes after the factfinder has made that determination." *Id* at 536-537. "[R]endering a judgment is merely the formal step of entering an order granting already-determined relief." *Id.* The "make an order or grant relief" language of section 1489 has the same import as the "rendering a judgment" language of the WPA: it simply describes the procedural step of entering an order based on the fact finder's determination or verdict. Indeed, as noted in Judge Murphy's concurring and dissenting opinion in *Forsberg*, relied upon by Taub, "the trial court's ability to 'grant relief' under MCL 450.1489(1) could certainly encompass the rendering of a judgment. I see no reason why the entry of an order under MCL 450.1489 cannot be premised on a jury verdict."[20] *Forsberg*, 2006 WL 3500897, at *11-12.

Here, the Trial Judge performed exactly the procedure for awarding relief that section 1489 contemplates. First, through pretrial proceedings, by approving the jury verdict form, by delivering the verdict form to the jury, and by instructing the jury accordingly, the Trial Judge determined and fixed the specific remedies available at trial. The Trial Judge decided, prior to trial, if Taub was found liable under section 1489, the available remedies would be economic damages and a buy-out of stock under section 1489. Accordingly, the verdict form, submitted by Taub and approved by the Trial Judge, simply asked the jury to state – after a finding of liability

[20] Judge Murphy further noted that "[b]oth statutes [section 1489 and the WPA] reference the court ordering relief that the court deems or considers appropriate. Such language did not prevent the Court in *Anzaldua* from finding that a right to jury trial existed. . . . I do not believe that simply because MCL 450.1489 lacks the 'rendering a judgment' language that it is distinguishable." *Forsberg*, 2006 WL 3500897, at*11-12.

– whether Madugula was "entitled to economic damages" from Taub and, if so, the amount, and whether Madugula was "entitled to have his stock purchased" by Taub and, if so, "the fair value of Plaintiff's interest in Dataspace for purposes of establishing the amount that Taub must pay." (App. 20b). The Trial Court, therefore, decided, "as it consider[ed] appropriate," see MCL 450.1489(1), the two specific remedies that the jury could and would consider at trial.

Second, the Trial Judge, acting within his broad discretion to "make an order" as he "considers appropriate . . . without limitation," utilized the jury to make what were essentially proposed findings regarding the two remedies at issue. The Trial Judge was, of course, free to adopt, modify, or reject the awards.

Third, the Trial Judge, consistent with the language of section 1489, "made an order" and "granted relief" as he "considered appropriate," setting forth in a separate document his Order of Judgment awarding a buy-out and economic damages to Madugula. (App. 16b). Therein, the Trial Judge stated that a jury was impaneled, the jury made certain findings, and that the Trial Judge, "[i]n light of the jury's findings," separately and independently "Orders that":

> A. Judgment in the amount of $191,675.00 is entered against Defendant, Benjamin Taub and in favor of Plaintiff, Rama Madugula for economic damages;
>
> B. Defendant, Benjamin Taub, is to buy back Plaintiff, Rama Madugula's, stock in Dataspace Incorporated at the fair value amount of $1,200,000.00 and a Judgment in that amount is entered against Defendant, Benjamin Taub and in favor of Plaintiff, Rama Madugula.

(*Id*). And, finally, that "the total judgment in this matter is $1,391,675[.]" (*Id*). The Trial Judge adopted the jury's findings and issued these awards in an independent Judgment. In following these standard trial procedures, the Trial Judge strictly complied with the "make an order or grant relief . . . as it considers appropriate" procedure provided by section 1489.

Fourth, the Trial Judge separately ratified the buy-out and economic damages award to

Madugula when he denied Taub's motion for judgment notwithstanding the verdict. In ruling on Taub's post-trial motion, the Trial Judge considered a "review of the pleadings, [trial] transcript and argument in Court by counsel for the parties" (App. 134b), and independently concluded, again, that the buy-out and economic damages awards, and the amounts thereof, were the appropriate remedy in this case. The Trial Judge, of course, had the benefit of being deeply familiar with the nuances of the case, including the parties' respective experts and theories, and that experience must be presumed to have necessarily informed his rulings in this case.

c. The Nature Of A Stock Valuation Should Not Preclude The Trial Judge From Utilizing A Jury In Awarding A Buy-Out

The legal, procedural, and policy reasons for allowing a trial judge to utilize a jury in awarding a buy-out and pure money damages in a section 1489 action are not outweighed by the suggestion that a jury is unequipped to handle the complexities of stock valuation. See *Curriden v Middleton*, 232 US 633, 636 (1914) ("It is said that the facts are complicated, but . . . mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction.").

Importantly, as in the instant case, the buy-out award is closely managed, overseen, and ratified by the trial judge, through pretrial, trial, and post-trial procedures and mechanisms, including those inherent in the trial judge's discretion to be the gatekeeper of expert testimony under MRE 702, and in the trial judge's discretion to manage his docket and individual cases. See, e.g., *Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006); *People v Grove*, 455 Mich 439, 470 (1997); MCL 600.611; MCR 1.105; MRE 611(a); MRE 702. The trial judge is empowered and well-positioned to manage and oversee the presentation, consideration, and award of the buy-out, from pretrial through post-trial proceedings. This, of course, includes, *inter alia*, holding pretrial conferences; ruling on pretrial motions including motions in limine; approving the jury verdict form; instructing the jury in all respects; at trial, overseeing the

presentation of evidence, witnesses, and testimony, and ruling on evidentiary motions; after trial, reviewing the buy-out award and choosing whether to adopt, modify, or reject the finding; and independently ruling on any post-trial motion challenging the buy-out award. The trial judge, as in the instant case, accomplishes all of this with knowledge of the experts' theories and valuation issues at hand. If the jury's buy-out award is not warranted by the evidence, the trial judge will modify the award accordingly.

Cardiac Perfusion Servs, Inc v Hughes, 380 SW3d 198 (Tex App, 2012) is an instructive shareholder oppression case in which the trial court conducted a jury trial. The jury found oppressive conduct and "that the fair value of [the minority shareholder's] shares was $300,000." *Id* at 201-202. "[B]ased on the jury's findings," the trial court issued a judgment ordering a buy-out of the minority shareholder's "shares at what the jury found to be the fair value." *Id.* The trial judge "instructed the jury" on using the "fair value" valuation method that is appropriate in this context, and the jury properly reviewed expert valuation testimony, which the court of appeals held "was not conclusory, and was legally sufficient to support the jury's finding that the fair value of [the minority shareholder's] shares was $300,000." *Id* at 205, 207.

This Court has long recognized the ability of juries to consider complex issues in rendering a financial award under the instruction and advice of the trial judge. In *Anzaldua II*, for example, the Court cited with approval *Friend v Dunks*, 37 Mich 25 (1877), pointing out that "the Court . . . determined that damages for mental anguish, loss of society, and the like were available under the statute, but stressed that care had to be taken to avoid damages that were too remote. . . . The jury, it seemed, was the proper body to so limit the plaintiffs' recovery[.]" *Anzaldua II*, 457 Mich at 542 n 10 (citations omitted). In *Friend*, the Court noted that the question came down to "the admission of evidence before the jury rather than a jury right," and "the Court's discussion leaves no room for doubt that the case was to go before the jury as a

matter of course." *Id.* Importantly, according to the Court, a jury would be considering "all the facts and circumstances in this class of cases . . . under such instructions and advice from the court as would tend to prevent the allowance of such as might be merely possible, or too remote and fanciful in their character to be safely considered as the result of the injury." *Id.* The same is true with regard to utilizing a jury in awarding a buy-out in a section 1489 action.

5. A Buy-Out Award Under Section 1489 Is A Form Of Damages

Lastly, a buy-out award under section 1489 is a form of damages, which confirms the trial judge's authority to utilize a jury in awarding a buy-out. See, e.g., *Anzaldua II*, 457 Mich at 542-543, 548 ("As far back as 1877, the Court has held that a jury is proper where a statute creates a cause of action for actual damages" and "where actual damages are at issue."); *Lorillard v Pons*, 434 US 575 (1978) (concluding that the ADEA contained the right to a jury, given Congress's inclusion of "legal" relief among the remedies available under the act).

a. The Statutory Language Fits The Definition Of Damages

"Damages" are "'pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered a loss, detriment, or injury, whether to his person, property, or rights[.]'" *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497 (2001), quoting Black's Law Dictionary (6th ed). A buy-out under section 1489 meets this definition.

In order to be awarded a buy-out under the statute, a minority shareholder must have "establish[ed] that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive[.]" MCL 450.1489(1). This is the detriment to his property or rights upon which the buy-out award is premised. The buy-out award is "[t]he purchase at *fair value* of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders *responsible for the wrongful acts*." MCL 450.1489(1)(e) (emphasis added). Thus, the wrongdoer is forced to pay a pecuniary sum – the "fair value" of

the stock – to redress the detriment suffered by the minority shareholder. This is a money judgment and a form of damages, and "where an action is . . . for the recovery of a money judgment, the action is one at law." *Whitehead v Shattuck*, 138 US 146, 151 (1891).

b. The Court Of Appeals Recognizes That A Buy-Out Is Damages

In two different 1489 actions, the Court of Appeals has expressly recognized that a buy-out under section 1489 is in fact "damages." In *Irish v Natural Gas Compression Sys, Inc*, No. 266021; 2006 WL 2000132, at *3 (Mich App, July 18, 2006), the court held that the two-year limitations period applicable to "claims requesting damages" under subsection 1489(1)(f) applied equally to the plaintiff's request for a buy-out award under subsection 1489(1)(e). The court held that "the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages. But this does not assist plaintiff." *Id.* According to the Court of Appeals, the "plaintiff *actually requests damages* because he seeks equitable relief only to compel Natural Gas Compression to purchase his shares at 'fair value.'" *Id* (emphasis added). Based entirely on its finding that a buy-out under subsection 1489(1)(e) is actually "damages" – unlike the other remedies listed in subsection 1489(1), and regardless of any equitable component to a buy-out remedy – the Court of Appeals held that the plaintiff's claim was time barred and upheld dismissal of his action. *Id.*

In *Schimke v Liquid Dustlayer, Inc*, No. 282421; 2009 WL 3049723, at *6 (Mich App, Sept 24, 2009), where the defendants unsuccessfully argued for a discount to the value of the minority's shares, the Court of Appeals recognized the buy-out valuation was "[a]n award of damages" and, thus, was to be "reviewed for clear error." Further, Michigan courts have recognized in similar contexts that a buy-out is "damages." See, e.g., *Romence v Carrier*, No. 253713; 2005 WL 991577, at *1 (Mich App, Apr 28, 2005) ("A trial court has discretion in awarding damages, including the remedy of specific performance in the purchase of stock.").

c. A Buy-Out At "Fair Value" Awards More Than Market Value

A "fair value" buy-out under section 1489 is *not* reduced by discounts for the stock's lack of marketability or minority status, which would otherwise reduce the stock's value in a "fair *market* value" situation. The buy-out language of subsection 1489(1)(e) does not reference "discounts," and an overwhelming majority of courts and commentators have rejected application of such discounts in determining fair value in the oppression context.[21]

By ignoring the practical reality of the stock's value if sold on the market, and providing the minority shareholder with a sum in excess of that actual value, a section 1489 buy-out award provides monetary compensation to the shareholder that is in the nature of damages. As explained by the oft-cited oppression expert, Douglas K. Moll, "perhaps the absence of discounts is 'overcompensation' that is tolerated in a freeze-out context. In other words, to offset the freeze-out harms that are undercompensated or not compensated at all, courts may be willing to overcompensate in other damage areas (e.g., by avoiding minority and illiquidity discounts when awarding the "fair value" of a stock)." Moll, *supra* note 19, at 1064.[22]

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[21] See, e.g., *Schimke*, 2009 WL 3049723, at *6 (affirming buy-out award under subsection 1489(1)(e) "without a discount for lack of marketability or minority status"); *Hayes v Olmsted & Associates, Inc*, 173 Or App 259, 280 (2001) ("[H]aving established oppression, plaintiff is entitled to be compensated for the fair value of his stock, without regard to discounts applicable in other settings."); *Cavalier Oil Corp v Harnett*, 564 A2d 1137 (Del, 1989) (rejecting both minority and marketability discounts); Moll, *Shareholder Oppression and "Fair Value"*, 54 Duke LJ 293, 318, 319-383 (2004) ("Minority and marketability discounts have no place in shareholder oppression disputes."); Moscow & Ankers, *Oppression of Minority Shareholders*, 77 Mich BJ 1088, 1094 (Oct 1998) ("We believe that no discount should be applied as a matter of policy in most cases where oppressive conduct is found under section 1489."); Bruno & Pynnonen, *Current Status of Oppression and Other Minority Rights Under MBCA § 489 and Other Theories*, 78 Mich BJ 1408, 1416 (Dec 1999) (citing cases) ("Many jurisdictions refuse to apply minority discounts for lack of control or marketability of minority shares.").

[22] See also, e.g., *Cavalier Oil Corporation v Harnett*, 564 A2d 1137, 1145 (Del, 1989) (To impose discounts "unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result[.]").

d. A Buy-Out At "Fair Value" Compensates For The Benefit-Of-The-Bargain And, Thus, Is A Form Of Expectancy Damages

i. Stock Ownership Is An "Investment Contract"

The minority shareholder in a close corporation is a holder of an "investment contract." See, e.g., McDaniel, *Bondholders and Corporate Governance*, 41 Bus L 413, 416 (1986). "[T]he minority shareholder parts with consideration (i.e., money) and receives in return a stock certificate that conveys, *inter alia*, a right to employment, a right to an active management role, and a right to a proportionate share of the company's earnings." Moll, *supra* note 19, at 1025, 1066-1068, 1070 ("[C]lose corporation shareholders strike an actual bargain between themselves when the minority decides to commit capital to the venture[.]"). "Oppressive conduct breaches" this "actual bargain between the shareholders . . . and it provides an opportunity for an unchecked majority to steal the investment of the minority." *Id* at 1079. The oppression cause of action and the buy-out award "insure that innocent shareholders will realize their bargained-for benefit . . . just as contract law seeks to enforce the bargain of the parties[.]"[23] *Id* at 993.

ii. A Buy-Out Award Is A Form Of Expectancy Damages

The buy-out award is a form of expectancy damages that compensates the minority shareholder for having not received the benefit-of-the-bargain on his "investment contract" when "the majority's oppressive actions breach these contractual terms." Moll, *supra* note 19, at 1054-1055. The buy-out award "compensate[s] for any appreciation (or depreciation) on the oppressed shareholder's investment" – and this compensation "suggests an expectation award." *Id* at 1054-1055. This compensation for the appreciation or depreciation of the minority

[23] See also, e.g., Bradley, *An Analysis of the Model Close Corporation Act and a Proposed Legislative Strategy*, 10 J Corp L 817, 840 (1985) ("[T]he minority shareholders have not entered the venture knowingly taking the investment risk that they may have to suffer the deprivation of any meaningful governance input or share in economic return because they have submitted to the exercise of an undiluted and untempered majority power short of fraud, misappropriations or breach of fiduciary duty.").

shareholder's stock constitutes a "partial award of expectation damages to the extent that it attempts to put the minority shareholder in an economic position similar to if the appreciation 'term' of the investment contract had not been breached." *Id.*

A buy-out award does not simply return the parties to their respective positions as if no "investment contract" had been made. The minority shareholder is not simply paid the amount of his original investment in the company, as would be accomplished with a restitutionary remedy. Indeed, a "mere award of restitutionary damages to an oppressed close corporation shareholder would effectively permit the majority to steal the investment value of the minority." Moll, *supra* note 19, at 1071. "By freezing-out the minority shareholder and by counting on a restitutionary remedy," the majority shareholder could effectively cash-out the minority for the amount of his original investment, even if the present "fair value" of the company reflected a much higher value. *Id.* "Because a mere restitutionary award would sanction the majority's theft of the minority's investment (effectively rewarding the majority for its "bargain-breaching" oppressive conduct) . . . a broad measure of relief is needed." *Id* at 1072. The buy-out award at "fair value" accomplishes this purpose as a form of expectancy damages.

II. THE COURT OF APPEALS AND THE TRIAL COURT WERE CORRECT IN HOLDING THAT THE WILLFUL VIOLATION OF A STOCKHOLDERS' VOTING AGREEMENT CONSTITUTES "EVIDENCE OF OPPRESSION," BECAUSE THE AGREEMENT COVERS PROTECTED SHAREHOLDER INTERESTS UNDER MCL 450.1489

In holding that Taub's willful violations of the supermajority provisions in the Stockholders' Agreement[24] constituted "[f]urther evidence of minority shareholder oppression,"[25] the Court of Appeals was careful to articulate that this "did not formulate a

[24] Which, despite its title, is a "voting agreement" under MCL 450.1461. In his Brief, Taub erroneously contends that it is a "shareholder agreement" under MCL 450.1488.

[25] Taub's actions are also evidence of "illegal" conduct under section 1489(1), as his willful failure to follow the written voting procedures renders his actions *ultra vires*.

blanket rule that any violation of the stockholders' agreement always constitutes minority shareholder oppression." (App. 171b). The Court of Appeals also properly relied on the principle that breaches of a contract – in this instance, breaches of the Stockholders' Agreement – "can be relevant evidence for separate causes of actions."[26] (*Id*). This holding is logical and is consistent with the text, purposes, and policies of MCL 450.1489, as shown by the plain language of the statute and the minority oppression case law.

Further, although the determination of whether the Court of Appeals was correct in its holding that oppression occurred in this case does not necessarily turn on whether the Stockholders' Agreement actually *creates* shareholder interests protected by section 1489 – given that Taub's actions, even independent of the Stockholders' Agreement, amply sustain the oppression claim – the answer to this Court's question in this regard is that *such an interest can arise out of a corporate governance document, including a stockholders' agreement, in certain circumstances, which must be examined and considered on a case-by-case basis.*[27]

Here, the Stockholders' Agreement does in fact give rise to such interests, because, as a voting agreement under MCL 450.1461, it vested Madugula with specific shareholder interests, including restrictions on reducing his compensation, changing the course of the business, and other actions that have a direct effect on his shareholding interest. Further, since Madugula's interests with which Taub substantially and disproportionately interfered were already protected shareholder interests under section 1489, to contend that these statutorily protected shareholder

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[26] It is axiomatic that the same evidence may support multiple legal claims. Existing legal doctrine, including election of remedies, adequately addresses this issue. See, e.g, *Riverview Co-op, Inc v The First Nat'l Bank and Trust Co of Michigan*, 417 Mich 307, 311-312 (1983) (the doctrine of election of remedies "prevent[s] double redress for a single injury").

[27] See, e.g, 18A Am Jur 2d Corporations § 767 (1985) ("The existence of oppression must be determined on a case by case basis taking into account the specific facts of each case."); *Landstrom v Shaver*, 561 NW2d 1, 9 (SD, 1997) ("Oppression is based on the totality of factual circumstances and is not relegated to a bright-line rule or implementation of a checklist.").

rights somehow disappeared once they were embodied in a corporate agreement is tantamount to arguing that Madugula waived them in the Stockholders' Agreement, which is not so.

A. The Plain Language Of Section 1489 Protects Against Interference With "Shareholder Interests" Irrespective Of How Those Interests May Arise, And It Does Not Exclude Interests That Are Covered By Or Have Their Genesis In Corporate Governance Documents

Since the question of what constitutes a protected shareholder interest under section 1489 necessarily invokes questions of statutory interpretation, the language of the statute must be the starting point. *Estes*, 250 Mich App at 277. "In construing a statute, this Court should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory." *Id* at 280, citing *Altman v Meridian Twp*, 439 Mich 623, 635 (1992). "As far as possible, effect should be given to every phrase, clause, and word." *Id* at 280, citing *Gebhardt v O'Rourke*, 444 Mich 535, 542 (1994). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Empire Iron Min Partnership v Orhanen Eyeglasses*, 455 Mich 410, 423 (1997).

In section 1489(1), the Legislature defined the conduct that is actionable under the statute as that which is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder." In subsection 1489(3), the Legislature further defined "willfully[28] unfair and oppressive conduct" as being that which "substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489. At the end of subsection 1489(3), the Legislature specifically addressed corporate governance documents, such as a stockholders' agreement, and did not provide that interests therein and breaches thereof will be excluded from

[28] The statutory language requiring that an unfair and oppressive act be "willful" strongly supports the conclusion that an *intentional* breach of a corporate agreement, as here, should be considered relevant evidence, as the court below found. Indeed, at trial, Taub brazenly admitted he did not have the supermajority to terminate Madugula. (App. 47b) ("I didn't have 70%, no.").

the analysis. Rather, it provided that oppression "does not include conduct or actions that are *permitted by* an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." MCL 450.1489(3) (emphasis added).

Thus, the Court of Appeals correctly noted that "nothing in MCL 450.1489 states that the stockholders' agreement has to be ignored in a minority oppression claim." (App. 171b). In defining the type of interests protected, the Legislature made no distinction between shareholder interests which may arise under, or be protected by, a corporate agreement and shareholder interests which exist only outside the four corners of such a document. Based on the plain language of the statute, the test is certainly not whether a shareholder interest is also embodied in a corporate agreement, but only whether the conduct "substantially interferes with the interests of the shareholder as a shareholder." See *Franchino v Franchino*, 263 Mich App 172, 183 (2004) ("If the statute is unambiguous, the Legislature is 'presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible'") (citation omitted). Had the Legislature intended to carve out from protection those interests that are also protected in corporate governance documents, it could have easily added qualifying language to that effect, such as, for example, "unless the interest is also protected by agreement." See, e.g., *Morales v Auto-Owners Ins Co*, 469 Mich 487, 491-492 (2003) ("In the face of the Legislature's clearly expressed intent, this Court will not read such an exception into the statute.").

Importantly, the Legislature expressly considered the effect of corporate governance documents on a section 1489 claim, and was keenly aware of the manner in which such documents may limit liability, as it included a provision creating a safe-harbor for conduct that is "permitted by" corporate governance documents.[29] MCL 450.1489(3). Thus, under the statute, a

[29] The Legislature's intent to not so limit the "shareholder interests" protected under section 1489 is further evidenced by the fact that it did not add any such qualifying language

corporate governance document can only insulate against liability under section 1489 when it is complied with, not when it is breached; and there is no prohibition in the statute against considering such breaches as evidence of oppression. See *Estes*, 250 Mich App at 279, citing *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210 (1993) ("The omission of a provision in one part of a statute that is included in another part should be construed as intentional[.]").

Further, while the statute provides a safe-harbor for conduct in conformance with a corporate governance document, to apply Taub's logic would mean that oppressors would also find refuge from section 1489 liability *in* their breaches. Certainly, this is not what the Legislature intended. Indeed, to extend Taub's logic to its conclusion reveals a *reductio ad absurdum*, as "it leads to a ridiculous conclusion." Black's Law Dictionary 1305 (8th ed 2004). To have it Taub's way, if a stockholders' agreement provided, for example, that the shareholders must properly disclose their interested transactions and self-dealing, or properly account for their company expenditures, or issue corporate dividends fairly, or make financial records available to the other shareholders, a controlling shareholder's breach of these obligations could *not* also constitute evidence of oppression. That is certainly not what the Legislature intended.

The answer is simple, and is found in the statutory language: if the evidence shows a substantial interference with a shareholder interest, it may constitute evidence of oppression (unless it is saved by the "permitted by" language of the statute). See MCL 450.1489(3). Interests of a shareholder *as a shareholder* are most certainly the subject of corporate governance documents, and, in particular, the Stockholders' Agreement here, which *only* dealt with shareholder interests, as its title so indicates. As the Court of Appeals found, "the supermajority provision is highly relevant in determining if Madugula's interests as a shareholder were

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when, in 2001, it amended subsection 1489(3) and added the "permitted by" language, nor in 2006, when it again amended subsection 1489(3) and added protection for employment interests.

substantially interfered with because this provision details what Madugula's interests and rights are[.]" (App. 171b). Trial courts must be able to determine, given the facts of the particular case, the shareholder interest(s) at issue and the evidence of interference therewith.[30]

What is "oppressive" is inherently a factual issue that depends on context, and a stockholders' agreement is one such context.[31] The Court should not fashion any rigid rule or formulism excepting from the shareholder interests protected by section 1489 those which might also arise in, or be protected by, a stockholders' agreement.[32] The creativity and possibilities in a controlling shareholder's oppression of a minority is unlimited, and those in control should not be given further safe-harbor that the Legislature has not provided.

Further, protecting all manner of shareholder interests, however they arise, is consistent with the purposes and policies underlying MCL 450.1489.[33] In *Estes*, the Court of Appeals provided a thoughtful discussion of the object of the statute and the harm it is designed to remedy, explaining, *inter alia*, that "*a shareholder who may pursue a suit under § 489 is unable to escape an oppressive situation by dispensing with shares of ownership in the public arena.*" *Estes*, 250 Mich App at 280 (emphasis in original). Further, "the shareholders of a closely held corporation participate in the management of the corporation, whereas the management of a

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[30] See, e.g., *Kiriakides v Atlas Food Sys & Servs, Inc*, 343 SC 587, 602 (2001) ("'[O]ppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case."); *Meiselman v Meiselman*, 309 NC 279, 298 (1983) ("[T]he 'rights or interests' of a shareholder in any given case will not necessarily be the same 'rights or interests' of any other shareholder" and "must be determined with reference to the specific facts in this case.").

[31] See, e.g., *Meiselman*, 309 NC at 298 (A "shareholder's 'rights or interests' in a close corporation include the 'reasonable expectations' . . . embodied in understandings, express or implied, among the participants").

[32] See, e.g., *Matter of Kemp & Beatley, Inc*, 64 NY2d 63, 73 (1984) (declining "to delineate the contours of the courts' consideration in determining whether directors have been guilty of oppressive conduct").

[33] "Michigan courts have consistently held that the purpose of § 450.1489 is to protect minority shareholders . . . from overreaching and heavy handed actions by the majority." *Bromley v Bromley*, No. 05-71798; 2006 WL 2861875, at *5 (ED Mich, Oct 4, 2006).

publicly held corporation represents the shareholders." *Id.* The close-corporation relationship heightens the fiduciary standards, "requir[ing] a higher standard of fiduciary responsibility, a standard more akin to partnership law,"[34] and "[t]he Legislature highlighted this special duty of care in the language of § 489(1)[.]" *Id* at 281. The purposes and goals of the statute would be undermined if a corporate fiduciary's willful violation of a corporate governance document, which exists for the protection and benefit of the shareholders, could not, at the very least, constitute evidence of oppressive conduct.

B. The Stockholders' Agreement Creates Shareholder Interests That Are Protected By Section 1489, Because It Is A Statutorily Authorized Voting Agreement, Which Provides Proscriptions With Respect To Matters That Are Already Protected Shareholder Interests

Madugula is not advocating that the provisions of every conceivable corporate document give rise to protected interests under section 1489. However, where the interests embodied in the document are akin to what is already a protected interest under section 1489, they should not lose such protections simply because they are also governed by the document – especially where the only effect on them is to require a supermajority before they are expressly permitted. The "Stockholders' Agreement" is precisely the type of governance document that is so intertwined with shareholder interests that it falls within this category. It simply creates rules requiring a certain number of votes before an action (that may already be considered oppressive) takes place.

The Stockholders' Agreement at issue in this case is a creature of statute known as a "voting agreement," governed by MCL 450.1461.[35] Section 1461 confirms this type of agreement has no other purpose than to define the manner in which shares are voted:

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[34] Partners owe each other the obligations of the utmost good faith and integrity in their dealings and fiduciary duties "connoting not mere honesty but the punctilio of honor most sensitive." *Band v Livonia Associates*, 176 Mich App 95, 113 (1989).

[35] The Stockholders' Agreement expressly provides that it is "governed by" and "established . . . in accordance with" MCL 450.1461.

> An agreement between 2 or more shareholders, if in writing and signed by the parties, may provide that in exercising voting rights, the shares held by them shall be voted as provided in the agreement, or as they may agree, or as determined in accordance with a procedure agreed upon by them. A voting agreement executed pursuant to this section, whether or not proxies are executed pursuant to the agreement, is not subject to sections 466 through 468. A voting agreement under this section shall be specifically enforceable.[36]

Thus, this statute allows for the proscription of certain mandates and parameters upon the shareholders "in exercising voting rights," and it could not more directly invoke shareholder interests – i.e., their voting rights. See *Franchino*, 263 Mich App at 184 ("Shareholder's rights are typically considered to include voting at shareholder's meetings[.]"). This is precisely the type of corporate governance document that gives rise to a shareholder interest, for it is designed to govern the way in which shareholder interests are managed within the corporation.

Not only is a "voting agreement" generally the type of agreement that invokes shareholder interests; but the specific provisions of the agreement in question involve interests that have been held to be protected under section 1489 *irrespective and independent of their being embodied in the Stockholders' Agreement*. For example, Section 5(b) prohibits "material changes in the nature of the business" without a supermajority vote. See, e.g, *Bromley*, 2006 WL 2861875, at *5 (holding that "investments deemed not to be in the corporation's best interest"[37] can constitute minority oppression) (citations omitted).[38] Section 5(d) limits the circumstances under which there may be material changes in compensation as to the shareholders. Not only are these shareholder employment benefits an interest protected by the Stockholders' Agreement, but

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[36] Notably, when section 1489 was added to the MBCA, the Legislature made no reference in either section 1461 or section 1489 even remotely suggesting that violations of a voting agreement could not constitute actionable shareholder oppression.

[37] Such as the JPAS venture, in the instant case, which was a miserable failure.

[38] Moreover, section 1489 liability arises out of oppressive conduct toward both "the corporation or to the shareholder." Therefore, business decisions that have a deleterious effect on the corporation also can be actionable. Here, as discussed, Taub's breaches of the Stockholders' Agreement were also highly damaging to the corporation, including his wasting hundreds of thousands of corporate dollars in a failed software development venture.

they are protected by the express language of subsection 1489(3) concerning "employment or limitations on employment benefits." See, e.g., *Berger v Katz*, Nos. 291663, 293880; 2011 WL 3209217, at *5 (Mich App, July 28, 2011) ("MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits[.]"). Section 5(f) precludes any action that would have a "material adverse impact" on one of the shareholders, but not the shareholders as a group, which can mean nothing other than one shareholder favoring himself over another. See, e.g, *Schimke*, 2009 WL 3049723, at *6 (holding that a disparity in financial benefits among the shareholders constituted an "inequitable status quo" and, thus, shareholder oppression).

Accordingly, this is the type of corporate governance document that involves already statutorily protected interests, and thus a violation of it should, and inherently must, constitute evidence of oppression. Indeed, if Taub had obtained supermajority approval for any of the conduct held to be oppressive, he would have asserted the subsection 1489(3) "permitted by" safe-harbor defense to avoid liability. A holding by this Court that Taub is entitled to, likewise, avoid section 1489 liability because he *breached* a corporate agreement (by not obtaining supermajority approval) would, in essence, judicially authorize the application of this defense when the action is *not permitted by* agreement, completely undermining the legislative intent.

C. Taub Advocates An Untenable Rule That Whenever An Oppressive Act Also Violates A Stockholders' Agreement, Or Other Corporate Governance Document, The Statutory Right To Relief Under 1489 Is Somehow Waived

Taub's conclusion is that Madugula does not have an oppression claim for oppressive acts, because he also has a breach of contract claim. This is nothing less than an argument that Madugula has allegedly waived his right to statutory relief for violations of statutorily protected interests, even though there is nothing in the Stockholders' Agreement that can even arguably be construed as a waiver. It is well-established that a waiver is the "intentional relinquishment or

abandonment of a known right." *Quality Products and Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 374 (2003). Further, "[t]he waiver of statutorily protected rights in a contractual provision should not be inferred unless the undertaking is 'explicitly stated'; such a waiver must be 'clear and unmistakable.'" *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 460 (1991). Here, the Stockholders' Agreement contains no language evincing a "clear and unmistakable" waiver of Madugula's statutorily protected rights under 1489. Section 1489 is neither mentioned nor referenced by implication.

D. The Holdings Of The Courts, Where Contract Interests Are Alleged To Give Rise To Shareholder Oppression Liability, Demonstrate That These Interests Are Protected, And The Only Limitation On Liability In This Regard Is Where The Alleged Wrongful Conduct Was "Permitted By" An Agreement

An examination of Michigan appellate jurisprudence, as well as other court holdings, demonstrates that the breach of a corporate governance document often supports a shareholder oppression claim – either as the crux of the claim, or as evidence of the oppression. The case law shows that courts regularly consider whether the corporate governance document in question gives rise to a shareholder interest, and determine whether the defendant acted in compliance with it. If he did, then, in Michigan, the subsection 1489(3) safe-harbor applies. If he did not, then the breach may be considered as evidence to support a shareholder oppression claim.

In *Estes*, one of the principal bases of the oppression claim was that the majority shareholder in control of the corporation was alleged to have "exercise[ed] a nonexistent right to redeem [plaintiff's] stock, which defendant's claimed had no value[.]" 250 Mich App at 274. The plaintiff alleged that this constituted a "Breach of Contract," because it was in violation of the Employee Stock Purchase Plan. *Id* at 274. Thus, the plaintiff's oppression claim in *Estes* was premised on the defendant's breach of an agreement concerning the stock of the corporation. *Id.* Although the holding in *Estes* addressed whether the claim was barred by the statute of

limitations, in order to reach that conclusion, the court carefully considered the nature of the claim and did not take any issue with the fact that the alleged breach of a contract was the basis of the section 1489 claim.[39]

A year after *Estes*, in *Reinhart v Cendrowski Selecky, PC*, Nos. 239540, 239584; 2003 WL 23104222, at *7-8 (Mich App, Dec 30, 2003), the Court of Appeals faced the question of whether the termination of a plaintiff's employment in order to trigger the forced sale of his stock under a stock restriction and purchase agreement constituted violations of section 1489. Thus, again, the plaintiff pled that a breach of a stock-related contract gave rise to an oppression claim. The court considered the terms of the contract in detail and affirmed a verdict in defendant's favor, ***not*** because the alleged breach of contract could not constitute oppression, but because the defendant's conduct was "permitted by" the agreement under subsection 1489(3).

Franchino v Franchino, supra, is of particular importance in this analysis, because of the Legislature's 2006 response to it, which firmly evinces a legislative intent to protect contractual interests of the minority shareholder. Indeed, the termination of Madugula in this case is very much like the termination of the plaintiff in *Franchino*, which the Court of Appeals held to not be oppressive, but which the subsequent legislative amendments triggered by the decision did deem oppressive. Specifically, the plaintiff in *Franchino* alleged that the controlling shareholder oppressed him under section 1489 "by terminating plaintiff's employment *in violation of the employment contract*, removing plaintiff from the board of directors, and amending the bylaws of the corporation." 263 Mich App at 178 (emphasis added). Similar to the supermajority

[39] This aspect of *Estes* is important to note, because, in his cite to *Estes* at page 29 of his Brief, Taub incorrectly contends that the *Estes* Court was "distinguishing between plaintiff's breach-of-contract cause of action brought under written stock purchase agreements and plaintiff's shareholder oppression claim, which was not memorialized in written agreement." However, the court did not draw this distinction at all. The only distinction drawn in *Estes*, and, specifically, at pages 285-286 of the opinion, to which Taub points, is between direct claims and derivative claims. For Taub to cast the *Estes* holding as such is highly misleading.

provisions in the instant case, the contract at issue in *Franchino* provided that "plaintiff could only be terminated by the unanimous agreement of [the company's] board of directors." *Id* at 174. The *Franchino* court affirmed the dismissal of the oppression claim on the ground that "employment and board membership are not generally listed among rights that automatically accrue to shareholders," and "these facts do not implicate plaintiff's interests as a shareholder[.]" *Id* at 184, 189. However, the Legislature swiftly amended the statute for the express purpose of rectifying the unintended consequences of *Franchino*, adding language to subsection 1489(3) that a claim can indeed arise out of "the termination of employment or limitations on employment benefits[.]" This direct legislative response to a case involving the breach of a shareholder's contract as the basis for shareholder oppression firmly establishes that the Legislature absolutely did not intend to exclude from section 1489 protection shareholder interests that may be tied to a corporate contract. Thus, it is abundantly clear that the breaches of the employment-related provisions of the Stockholders' Agreement are sufficient to establish oppression, in addition to the breaches of the other provisions.

In 2006, in *Lozowski v Benedict*, No. 257219; 2006 WL 287406 (Mich App, Feb 7, 2006), the Court of Appeals held that the very same evidence that was alleged to constitute a breach of contractual duties was sufficient to allege a minority oppression claim. Specifically, in *Lozowski*, the plaintiff alleged that the "funneling of corporate funds to two other corporations that defendants controlled" gave rise to claims of breach of contract and oppression. *Id* at *2-3. While the court affirmed the dismissal of the contract count on the ground that the breach harmed only the corporation, it reversed the trial court's dismissal of the oppression claim on the ground that *the very same evidence* which was alleged to breach a corporate contract "interfered with the interests of the shareholder as a shareholder." *Id* at *3. Thus, evidence of a breach of

corporate contract, even with no contract claim, was sufficient to sustain an oppression claim.[40]

Further, other Michigan courts have considered whether corporate governance agreements were breached in determining whether to sustain an oppression claim, and have upheld dismissals on the grounds that such agreements were not breached.[41] Meanwhile, the courts of other jurisdictions have repeatedly found the breach of a corporate governance agreement to be evidence of shareholder oppression.[42] Further, as in Michigan, other courts have upheld dismissals of oppression claims because a corporate document was not breached.[43]

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[40] See also *Andreozzi v Stony Point Peninsula Assoc*, No. 281113; 2009 WL 1567359, at *4 (Mich App, June 4, 2009) (holding that the directors' act of "violating a supermajority voting requirement in the bylaws . . . if committed within the confines of a closely held business corporation, would likely give rise to a cause of oppression under MCL 450.1489").

[41] See, e.g., *Kent Tillman, LLC v Tillman Const Co*, No. 263232; 2006 WL 143289, at *3-4 (Mich App, Jan 19, 2006) (no member oppression under MCL 450.4515 because no evidence defendant "did anything in violation of the LLC operating agreement" and treatment of minority member "was not inconsistent with the provisions of the operating agreement"); *Nagia v Chota*, No. 229311; 2002 WL 1308335, at *3 (Mich App, June 14, 2002) (affirming dismissal of section 1489 action because, *inter alia*, a lack of evidence "that defendants violated the terms of the pre-incorporation agreement by amending the corporation's bylaws so as to reduce the number of directors from two to one without plaintiffs' consent or knowledge"); *Blankenship v Superior Controls, Inc*, 2013 WL 4760972, at *4 (ED Mich, Sept 4, 2013) (no evidence of oppression to support section 1489 claim including because "the 'value' which Defendants stated would be given is in compliance with the [Shareholder] Agreement and therefore 'fair'").

[42] See, e.g., *Ballard v Roberson*, 399 SC 588, 596-598 (2012) (affirming finding of oppression where issuance of additional stock was "in direct conflict with the Articles . . . and is contrary to the agreed upon allocations of the Agreement," and "would allow [defendant] to avoid his contractual obligation to provide the needed capital under the Agreement"); *Kiriakides v Atlas Food Sys & Servs, Inc*, 343 SC 587, 605 n 28 (2001) (listing among "[c]ommon freeze-out techniques" a "host of factors" including "failure to enforce contracts for the benefit of the corporation") (citation omitted); *Adler v Tauberg*, 881 A2d 1267, 1270-1271 (Pa Super Ct, 2005) (affirming finding of oppression where the defendants had transferred shares of stock "in violation of the parties' agreement(s)"); *Simms v Exeter Architectural Products, Inc*, 868 F Supp 668, 673 (MD Pa, 1994) ("Plaintiff's allegations of wrongful termination . . . and Defendants' intentional disregarding of the Shareholder Buy-Sell Agreement certainly raise the issue of oppression[.]"); *Musto v Vidas*, 281 NJ Super 548, 556-557 (App Div 1995) ("[D]efendants' decision to end the rotating CEO position was violative of the . . . oral agreement among the three shareholders that 'all major decisions were to be made unanimously[.]'").

[43] *Orloff v Weinstein Enterprises, Inc*, 247 AD2d 63, 67 (NY, 1998) ("[P]laintiffs do not show nor even allege in terms of the purported oppression by the majority that there was a violation of any resolution or bylaw of the corporation."); *Landstrom v Shaver*, 561 NW2d 1, 11

Given these holdings, it can hardly be said that the Court of Appeals' decision in this case is an "outlier." Michigan courts, and other jurisdictions, have been dealing with corporate contract interests in the context of minority oppression for years, and there is nothing in these holdings to suggest anything other than the fact that contract interests may constitute evidence of both oppression and non-oppression.[44]

Firing the minority shareholder; terminating his executive management position; eliminating all of his benefits; withholding information; and completely changing the nature of the business, all on the heels of trying to sell the company for $12 million, and all in violation of a supermajority agreement, no less – that is oppression.

III. MADUGULA'S KEY INTERESTS AS A SHAREHOLDER WERE INTERFERED WITH DISPROPORTIONATELY BY TAUB, DESPITE THE FACT THAT MADUGULA RETAINED HIS CORPORATE STOCK AND DIRECTORSHIP

MCL 450.1489(3) provides that "[w]illfully unfair and oppressive conduct . . . may include the *termination of employment or limitations on employment benefits* to the extent that the actions *interfere* with *distributions or other shareholder interests disproportionately* as to the affected shareholder." (Emphasis added). Taub's termination of Madugula's employment and elimination of Madugula's employment benefits accomplished exactly that, severely affecting key shareholder interests of Madugula, including, *inter alia*: (1) totally eliminating the principal financial benefit Madugula derived from his stock ownership; and (2) shutting Madugula out of

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(SD, 1997) (finding of no oppression where "there is no evidence that the Defendants . . . violated the by-laws of the corporation").

[44] Notably, the only Michigan case *Taub* could cite was *Trapp v Vollmer*, No. 297116; 2011 WL 2423884, at *2 (Mich App, June 16, 2011), where the Court of Appeals actually found that the document upon which the plaintiff based his oppression claim was "merely an unenforceable agreement to negotiate," which "failed to outline any of the succession terms." Further, even if the alleged agreement was enforceable, it was not the type of agreement that embodies shareholder interests. It was merely an agreement between fellow shareholders to enter into an undefined succession agreement seven years hence. *Id.*

participating in Dataspace's affairs and voting on material business decisions. The fact that Madugula retained his stock and directorship do not diminish these substantial interferences.

A. Madugula's Compensation And Employment Benefits Were Key Shareholder Interests And The Principal Form Of Shareholder Distributions

In close corporations, employment is often a fundamental shareholder interest. "That people often invest in a closely-held corporation to provide a job is almost self-evident[.]"[45] A shareholder's employment compensation (and related benefits) is often the sole means by which the shareholder realizes the financial benefits of shareholding, and may "be the critical component of his or her overall investment return." See Moll, *supra* note 16, at 1012-1015.[46] A shareholder may receive very little in dividends because, as here, "closely held corporations often distribute de facto dividends to their employee-shareholders in the form of enhanced salary and benefits." Ragazzo, *supra* note 46, at 1110 (citing cases).[47] "Indeed, close corporations often prefer to distribute as much of their profits as they can in the form of salary because, unlike dividend payments, salary payments provide a tax deduction to the corporation." *Id* at 1110.[48]

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[45] Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares,* 65 Notre Dame L Rev 425, 468 (1990). See also, e.g., *Wilkes v Springside Nursing Home, Inc*, 353 NE2d 657, 662 (Mass, 1976) ("A guaranty of employment with the corporation may have been one of the basic reason(s) why a minority owner has invested capital in the firm.").

[46] See also, e.g., Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 Wash U LQ 1099, 1109-1110 (1999) ("In a closely held corporation, a shareholder-employee has interests in his job and stock that are often economically intertwined . . . . He often invests for the purpose of having a job, and the salary and other benefits he receives are conceived to be part of the return on his investment."); *Muellenberg v Bikon Corp,* 669 A2d 1382, 1385 (NJ, 1996) (noting that participation in the business is the "principal source of employment and income" for many close corporation shareholders).

[47] See also, e.g., Moll, *supra* note 19, at 997-998 ("[T]he close corporation investor typically looks to salary rather than dividends for a share of the business returns[.]"); O'Neal & Thompson, 2 Close Corporations § 1.08, at 32 (3d ed) ("Earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits.").

[48] O'Neal & Thompson, 1 Oppression of Minority Shareholders § 1:03, at 4-5 (2d ed) ("[A] close corporation, in order to avoid so-called 'double taxation,' usually pays out most of its earnings in the form of salaries rather than as dividends.").

When this sole means of financial benefit is eliminated by the controlling faction, as here, so too is the realization of any value from the company by the minority shareholder.[49] In a company like Dataspace that distributes its profits in salaries, "firing an employee is little different from canceling his shares." *Nagy v Riblet Prods Corp*, 79 F3d 572, 577 (7th Cir 1996).

B. Taub's Termination Of Madugula's Compensation And Employment Benefits Constitutes A Disproportionate Interference With Such Interests

Taub's actions constitute a disproportionate interference with Madugula's fundamental shareholder interests. Madugula invested $87,000 to become a shareholder of Dataspace, which was the maximum he could afford, as shown by the need to reduce the liquidation value of the company to enable the purchase – something Taub strongly desired to do, because his company was sinking fast. (App. 108b-113b, 89b). Madugula invested his savings into a floundering company, taking a substantial risk, and making a huge investment of time and talent, but with the promise of $150,000 in annual compensation and an executive management position.

Indeed, upon Madugula's investment in Dataspace, the shareholders specifically agreed that they would each receive a "base salary" of $150,000 annually, as their principal financial benefit of stock ownership. (App. 59b-60b). Taub's testimony demonstrates that these salaries were tied directly to the parties' status as shareholders – this compensation was the way in which "the three shareholders . . . were going to get paid." (*Id*). The shareholders went so far as to include protections against changing this compensation in the *Stockholders'* (not "employment") Agreement, further evincing a clear intent to render this a shareholder interest. (App. 116b). The protection of a "base salary" for the shareholders was, thus, on par with the right of the

[49] Murdock, *supra* note 45, at 468 ("[T]o deny a minority shareholder employment when a job was part of his rationale in investing is oppressive[.]"); *Hayes v Olmsted & Associates, Inc*, 173 Or App at 265-266 ("The 'squeeze-out' tactics of majority shareholders often deprive minority shareholders of management participation, employment income or other advantages . . . which are the essential benefits of their investment.").

shareholders to receive dividends to negate the tax burdens arising out of the S-corporation election. Further, the inclusion of both of these benefits – a base salary, and dividends to negate tax liability – as a package in the Stockholders' Agreement confirms that they are, equally, shareholder interests, and warranting equivalent protection under MCL 450.1489(3).

Meanwhile, until he was pushed out, Madugula's efforts at Dataspace resulted in exponential growth of the business – so much so that Taub put the company on the seller's block for $12 million. Yet, after Madugula had brought the company back from the brink of failure, with big money on the horizon, Taub unilaterally terminated Madugula's employment position; reduced his salary from $150,000 to zero; and eliminated his health insurance, car payment, and expense account. (App. 122b, App. 46b, 58b, 82b-85b). Madugula has since received only a contractually mandated, minimal distribution to cover his tax liabilities as a result of the S-corporation election, as Taub continues to pay himself the lucrative shareholder salary of $150,000, and continues to receive all benefits of being a shareholder-employee of Dataspace.

The Court of Appeals correctly found that the termination of Madugula's employment "disproportionately affected Madugula's interest as a shareholder because Madugula's compensation was reduced to zero[.]" *Id.* Only Madugula received this financial punishment. Only Madugula lost his employment position and his principal means of realizing the financial benefit of his shareholding interest – the lucrative shareholder-employee salary and employment-related benefits.[50] Thus, the impact on Madugula was clearly disproportionate.[51] While Taub

[50] See, e.g., *Balvik v Sylvester*, 411 NW2d 383, 388 (ND, 1987) ("Balvik was . . . fired as an employee of the corporation, thus destroying the primary mode of return on his investment.").

[51] See, e.g., *Berger*, 2011 WL 3209217, at *5 ("MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits," and oppression is found where the "defendants' conduct was designed to prevent IPAX from showing a profit that could be distributed to plaintiff as either rent or salary."); *In re Judicial Dissolution of Kemp & Beatley, Inc*, 473 NE2d 1173, 1180-1181

asserts that Madugula still has the right to receive dividends, this fails to recognize, *inter alia*, that: (1) the dividends are minimal and are just enough to negate the pass-through tax liability (to undo the burden of stock ownership); and (2) MCL 450.1489(3) applies equally to "shareholder interests" *other than* distributions.

Taub's assertion (at page 35 of his Brief) that this case is "fundamentally different" from those in which "majority shareholders are trying to squeeze out a minority shareholder who has made a major investment in the company" is not only factually baseless and an erroneous interpretation of case law, but also typifies the oppressive intent that often permeates a majority's psyche and drives the very oppression sought to be protected by section 1489 – namely, the "I was here first" entitlement. Protection under MCL 450.1489 certainly does not require a "major investment," and even *Irish* and *Berger*, cited by Taub, do not support this contention.[52] Notwithstanding, Madugula's investment in this business was major – he paid his savings of $87,000 for his initial shares, and faithfully devoted nearly five years of his life to the business while foregoing various other opportunities.

Further, Taub's contention that Madugula was not an employee of Dataspace deserving of the protection of MCL 450.1489 is meritless. As correctly found by the Court of Appeals:

> [T]he evidence established that Madugula was providing services directly to Dataspace. . . . '[E]mployment is defined as the act of employing someone and to 'employ' means 'to engage the services of a . . . person.' *Random House Webster's College Dictionary* (2005). Madugula was hired to provide services to Dataspace. Madugula also received regular compensation from Dataspace, health benefits, and a Dataspace email address. Considering that Dataspace was engaging the services of Madugula and provided him with regular and substantial compensation, the termination of Madugula's services was a 'termination of employment' in the context of MCL 450.1489."

(NY, 1984) (finding oppression of minority based in part on majority's decision to pay itself de facto dividends in form of salary bonuses after minority shareholders were discharged).

[52] The *Irish* decision makes no mention of a "major investment," and, even if the plaintiff in the case made one, the court dismissed his oppression case based on a lack of standing. Likewise, the *Berger* decision makes no reference to the investment by the minority.

(App. 171b-172b). In addition to the fact that Madugula was hired as Vice President of Sales and Business Development at Dataspace (App. 25b), Madugula was paid a salary from Dataspace (App. 59b-60b), and Madugula received health insurance through Dataspace (App. 46b, 85b), the Stockholders' Agreement anticipates that the parties will be "acting as . . . employees" with Dataspace (App. 114b) and, further, provides that Madugula is one of the "Vice Presidents" of Dataspace and will take part in the "control and operation" of Dataspace. (App. 115b).

C. The Legislature's Response To *Franchino* Confirms That MCL 450.1489 Protects Shareholders In Exactly Madugula's Situation

In 2006, the Legislature amended MCL 450.1489(3) to expand the definition of actionable conduct to "include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." The legislative history of the amendment explains that this language was added "in response to the case *Franchino v. Franchino*," where "[t]he court concluded that there is not a private cause of action when a shareholder's employment by the corporation is terminated under willfully unfair and oppressive conduct by the majority shareholder, when it does not affect his interest as a shareholder." (Add. 15).

Notably, the material facts of *Franchino* are very similar to the facts of the instant case, and thus, just as the 2006 Amendment was intended to protect against the result suffered by the plaintiff in *Franchino*, it was intended to protect against the wrongs suffered by Madugula. In *Franchino*, the Court of Appeals framed the issue as follows:

> Whether MCL 450.1489 creates a cause of action for a shareholder in a close corporation when the shareholder is removed from the corporation's board of directors *and his employment with the close corporation is terminated.*

263 Mich App at 173 (emphasis added). The court held that section 1489 "does not . . . guarantee his employment with the corporation," that "MCL 450.1489 only protects a

shareholder's interest as a shareholder," and the "decision to fire plaintiff and remove him from the board of directors did not affect plaintiff's interests as a shareholder under MCL 450.1489." *Id* at 174-174. Although the decision references Mr. Franchino's position on the board, the focus of the decision and the thrust of the 2006 Amendment was on the minority shareholder's employment position, as explained in the legislative history of the 2006 Amendment:

> The amendment is intended to authorize consideration of employment actions if the actions disproportionately affect shareholder interests, such as through denial of shareholder distributions or a termination of employment to coerce shareholder action. * * * It expands the rights of the shareholder, as a shareholder. It is trying to protect the minority shareholder from the majority shareholder, where he is an employee of the corporation, from being terminated by the willfully unfair and oppressive conduct of the majority shareholder.

(Add. 15). The instant case falls squarely within the intent of the 2006 Amendment: Taub's termination of Madugula disproportionately affected Madugula's shareholder interests – eliminating his shareholder distributions (in the form of compensation and benefits) and shutting him out of material business decisions. Ultimately, Taub was attempting to "coerce shareholder action" by putting his foot on Madugula's neck, to force Madugula to sell his shares below fair value. (App. 86b; see also App. 121b – e-mail from Taub plotting before terminating Madugula of ways to take total control of the corporation, "sc**w Rama," and get Rama to sell his shares).

D. Madugula's Participation In Corporate Decisions Was Also A Shareholder Interest, And Taub's Termination Of Madugula's Employment Disproportionately Interfered With This Interest

In addition to the elimination of Madugula's shareholder-employee compensation and employment-related benefits, Taub's termination of Madugula's employment, as held by the Court of Appeals, also "disproportionately affected Madugula's interest as a shareholder because . . . he was no longer involved in decisions on material issues such as the development of JPAS." (App. 172b). Once Taub fired Madugula, he altogether shut Madugula out of Dataspace's affairs, eliminated Madugula's ability to be informed about and vote on material business

decisions, and caused the company to expend hundreds of thousands of dollars on the failed JPAS venture without ever consulting Madugula or allowing Madugula to vote on this material business decision. (App. 79b-80b, 94b-95b, 106b). Having been pushed out and isolated from Dataspace, Madugula did not even learn of the massive JPAS expenditure until Taub's deposition. (*Id*). Madugula had an important shareholder interest in knowing about, and being able to vote on, material business decisions, as Taub concedes (see Taub's Brief, p 41).

Taub has unilaterally made business decisions affecting Dataspace, such as the JPAS venture, and Taub maintains sole access to the corporate books and records, all of which disproportionately interferes with Madugula's shareholder interests. See, e.g., *Berger*, 2011 WL 3209217, at *5 (affirming finding of oppression where "[t]here was also evidence that defendants refused to allow plaintiff to participate in corporate decisions" and "as a shareholder to participate in decisions affecting the corporation"); *Bromley*, 2006 WL 2861875, at *7 (finding likelihood of oppression where defendants had "removed Plaintiffs from management positions, made it more difficult for them to exercise rights as shareholders . . . hindered access to corporate books and information," and used "their majority and control position to keep Plaintiffs out of corporate affairs"). Taub's suggestion that a shareholder must make a statutory demand to inspect books and records before an oppression claim is triggered ignores the fact that "[oppressive] conduct include[s] . . . denying access to corporate books and records[.]" *Id* at *5.

E. It Is Irrelevant That Madugula Retained His Shares And Directorship

In order to bring a claim under section 1489, one must be a current shareholder. See, e.g., *Estes*, 250 Mich App at 282-283 ("[P]laintiffs in a § 489 suit may only be current shareholders."); MCL 450.1489(1) ("A shareholder may bring . . . ."). Under MCL 450.1109(1), a "shareholder" is a "person holding units of proprietary interest in a corporation," and this "means a current shareholder, i.e., holding the shares in the present." *Irish*, 2006 WL 2000132,

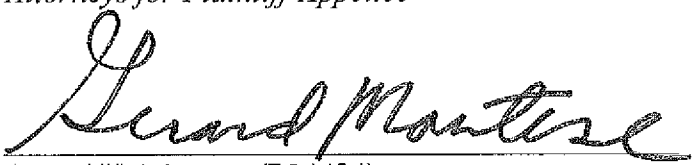
at *2. Because the statute itself requires that Madugula be a current shareholder in order to bring a claim under it, the fact that Madugula retained his shares of course cannot diminish, in any way, the fact that Madugula's shareholder interests were interfered with disproportionately. The statute's requirement of current stock ownership would otherwise be rendered nugatory. Further, the fact that Madugula is a director does not negate any of Taub's oppressive actions. There is nothing in MCL 450.1489 to even remotely suggest that all a majority shareholder must do to insulate himself from liability under section 1489 is to make sure that the minority shareholder retains a seat on the board. Such a rule would lead to absurd, and indeed unconscionable, results.

RELIEF SOUGHT

Madugula respectfully requests that this Court affirm the decision of the Court of Appeals, therefore permitting the March 31, 2010 Order of Judgment of the Trial Court to take full force and effect; and grant Madugula all other appropriate relief.

Respectfully Submitted,

MANTESE HONIGMAN ROSSMAN AND WILLIAMSON, P.C.
Attorneys for Plaintiff-Appellee



Gerard V. Mantese (P34424)
Brian M. Saxe (P70046)
Mark C. Rossman (P63034)
1361 E. Big Beaver Rd.
Troy, MI 48083
(248) 457-9200 phone
(248) 457-9201 fax

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